RIBARU BINA SDN BHD & ANOR A

v.

BAKTI KAUSAR DEVELOPMENT SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
SURIYADI HALIM OMAR JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: W-02-399-2003]
30 NOVEMBER 2006 C

CIVIL PROCEDURE: *Summary judgment - Leave to defend - Appeal against grant of unconditional leave to defend action - Proper mode of pleading triable issues - Whether there was lack of bona fides - Whether there were triable issues* D

CONTRACT: *Building contract - Claim for monies owing - Issue of payment due under progress payment certificates - Summary judgment - Whether ought to be granted - Whether there were triable issues*

This was an appeal by the appellants/plaintiffs against the order of E the High Court judge reversing the senior assistant registrar's order entering judgment for the plaintiffs for part of their claim, and granting the respondents/defendants unconditional leave to defend the action. The Government of Malaysia had awarded the first defendant a contract to build and develop a transit camp at F Setapak in Kuala Lumpur ('building contract'). The first defendant subcontracted the building contract to another company; then, by the terms of a novation agreement, the first plaintiff agreed to take over the contract from said company. Later, construction work commenced, and the second defendant, the holding company of G the first defendant, issued progress payment certificates Nos. 2 to 11 to the second plaintiff, its main subcontractor. All these certificates were issued under its own hand and it paid the second plaintiff a sum of RM13,574,227.71 under progress payment certificates Nos. 2 to 10. Subsequently, the parties terminated the H contract and it was common ground that the second defendant did not pay any sum on certificate No. 11. It was this certificate that formed the subject matter of the plaintiffs' claim. The defendants contended that there were triable issues, submitting that: (i) there was no privity of contract either between the I plaintiffs and the second defendant, or between the second plaintiff and the defendants; (ii) interim certificate 11 was not

certified in accordance with the terms of the building contract as, firstly, there was a need for the superintending officer and the project director to sign the certificate, and secondly, the certificate was bad because only one director of the second defendant, namely, Haji Tarin Ayub, signed it whilst the managing director of the second defendant, namely, Hj Baharin Ayob, did not; (iii) certificate 11 was a final certificate and was, therefore, subject to deductions and a set-off in respect of works not properly executed by the plaintiffs; and (iv) there was not an immediately payable debt because there was no time specified within which the monies certified by certificate 11 should be paid.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

(1) The ground of privity of contract was neither pleaded in the defendants' defence nor raised in the affidavits filed on their behalf, and to raise triable issues by way of submission on a point not raised in a defence or an affidavit would not meet the requirements of procedural fairness, which is the essence of any litigation. In the present case, the learned judge ought not to have taken any notice of the submission on the privity of contract point since it had not been raised in the affidavit or defence. There was, therefore, merit in the plaintiffs' complaint on this part of the case. (paras 4 & 5)

(2) On the facts, the requirement for certification of the work by the superintending officer and the project director had ceased to be applicable and it was on this basis that the building contract was proceeded with by the plaintiffs and the defendants. This was evidenced by the fact that certificates 1 through 10 were honoured and paid by the defendants although the superintending officer and the project director did not sign any of them. (para 6)

(2a) There was no requirement anywhere in the building contract as to how many directors of the second defendant should sign a certificate before it would be valid. On the other hand, the second defendant honoured certificate 7 by making payment on it even though only Hj Baharin Ayob signed it and Haji Tarin Ayub did not. (para 7)

(3) There was much force in the plaintiffs' argument that the suggestion that the work done was defective and improper was an afterthought on the defendants' part meant to delay the plaintiffs from obtaining final judgment of the sum set out in certificate 11. Further, there was no merit in the argument that certificate 11 was a final certificate. When certificate 11 was compared with certificates 1 through 10, it was found that it was in the same form as those other certificates. There were only two deductions which all eleven certificates provided for, which were the previous interim payments and the retention sum of 10%. Hence, it could not be correct to describe certificate 11 as a final certificate. (paras 9 & 10)

(3a) In the present instance, it was clear that there was no contractual provision conferring upon the defendants a right of set-off against the plaintiffs in respect of the work done under certificates 1 through 11. Further, no right of set-off was pleaded in the defendants' defence which is a requirement of the law of practice and procedure. Even assuming (without deciding) the defendants did have a right of set-off on the facts (which was not the case), that was a matter that had to be resolved by way of adjustments when the final certificate came to be issued. (para 11)

(4) There was no merit in the defendants' argument that there was not an immediately payable debt. Once certificate 11 was issued by the second defendant specifying the amount that was due under that certificate, it became an immediately payable debt. Furthermore, in this case, unlike the usual case where it is an architect who issues an interim certificate, it was the second defendant itself that did so. Certificate 11 was accordingly an admission by the second defendant to the second plaintiff that the sum stated therein was due and payable. The defendants' attempts to discover all sorts of excuses to avoid paying the second plaintiff what was due to it for work done strongly supported an inference of the defendants' lack of *bona fides*. (para 12)

(5) The learned judge misdirected himself when he held that there were triable issues entitling the defendants to unconditional leave to defend this case. (para 16)

A ***Bahasa Malaysia*** *translation of headnotes*

Ini adalah rayuan oleh perayu/plaintif terhadap perintah hakim Mahkamah Tinggi kerana mengakas perintah penolong kanan pendaftar yang membenarkan sebahagian tuntutan plaintif, serta
B memberi izin tak bersyarat kepada responden/defendan untuk memasukkan pembelaan. Kerajaan Malaysia telah mengawardkan kontrak kepada defendan pertama untuk membina dan membangunkan sebuah kem transit di Setapak, Kuala Lumpur ('kontrak bangunan'). Defendan pertama telah sub-kontrakkan
C kontrak bangunan kepada sebuah syarikat lain; selepas itu, melalui satu perjanjian novasi, plaintif pertama bersetuju untuk mengambil-alih kontrak bangunan dari syarikat tersebut. Kerja-kerja binaan kemudian dimulakan, dan defendan kedua, syarikat induk defendan pertama, telah mengeluarkan sijil bayaran progress No. 2 hingga 11
D kepada plaintif kedua, iaitu kontraktor utamanya. Kesemua sijil-sijil dikeluarkan sendiri oleh defendan kedua, yang membayar plaintif kedua sejumlah RM13,574,227.71 di bawah sijil bayaran progress No. 2 hingga 10. Berikutnya, pihak-pihak menamatkan kontrak dan tidak dinafikan bahawa defendan kedua tidak membuat apa-apa
E bayaran di bawah sijil No. 11. Sijil ini menjadi asas kepada tuntutan plaintif di sini. Defendan-defendan menyatakan bahawa wujud isu-isu yang boleh dibicarakan, sambil berhujah bahawa: (i) tidak terdapat priviti kontrak sama ada di antara plaintif-plaintif dan defendan kedua, atau di antara plaintif kedua dan defendan-
F defendan; (ii) sijil interim 11 tidak disahkan mengikut kehendak terma kontrak bangunan disebabkan, pertama, ia perlu ditandatangani oleh pegawai penjaga dan pengarah projek, dan kedua, sijil adalah cacat kerana hanya ditandatangani oleh seorang sahaja pengarah defendan kedua, iaitu Haji Tarin Ayub, sementara
G pengarah urusan defendan kedua, Hj Baharin Ayub, tidak menandatanganinya; (iii) sijil 11 adalah sijil terakhir dan dengan itu adalah tertakluk kepada potongan-potongan dan set-off berhubung kerja-kerja yang tidak disempurnakan dengan baik oleh plaintif-plaintif; dan (iv) tidak wujud hutang yang perlu segera dibayar
H disebabkan tiada tempoh masa diberikan bagi pembayaran wang yang disahkan oleh sijil 11.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

I **(1)** Alasan priviti kontrak tidak diplidkan dalam pembelaan defendan-defendan mahupun dalam afidavit-afidavit yang difailkan bagi pihak mereka, dan untuk membangkitkan soal

isu boleh dibicarakan melalui rumusan hujah di mana hal tersebut tidak dibangkitkan dalam pembelaan atau afidavit adalah tidak menepati kehendak keadilan prosedur, yang menjadi asas kepada sesuatu pertikaian guaman. Dalam kes semasa, yang arif hakim tidak seharusnya memberi pertimbangan kepada hujah priviti kontrak, kerana ia tidak dibangkitkan dalam pembelaan ataupun afidavit. Oleh itu, terdapat merit pada bantahan plaintif berhubung perkara ini.

(2) Di atas fakta, keperluan pengesahan oleh pegawai penjaga dan pengarah projek tidak lagi terpakai, di mana atas dasar inilah kedua-dua plaintif dan defendan terus melaksanakan kontrak bangunan. Ini terbukti apabila sijil-sijil 1 hingga 10 diterima dan dibayar oleh defendan-defendan walaupun sijil-sijil tersebut tidak ditangani oleh pengawai penjaga dan pengarah projek.

(2a) Kontrak bangunan tidak menyebut apa-apa tentang bilangan pengarah defendan kedua yang perlu menandatangani sijil sebelum ianya menjadi sah. Sebaliknya, defendan kedua menerima sijil 7 dengan membuat pembayaran atasnya walaupun ia hanya ditandatangani oleh Hj Baharin Ayob dan tidak oleh Haji Tarin Ayub.

(3) Ada asas yang kuat pada hujah plaintif bahawa pengataan defendan bahawa kerja yang dibuat cacat dan tak teratur hanyalah satu afterthought bertujuan untuk melambatkan penghakiman muktamad kepada plaintif terhadap jumlah yang disebut dalam sijil 11. Selain itu, tiada merit pada hujah bahawa sijil 11 adalah sijil terakhir dan muktamad. Apabila sijil 11 dibandingkan dengan sijil-sijil 1 hingga 10, didapati bahawa bentuknya adalah sama seperti sijil-sijil yang lain tersebut. Terdapat hanya dua potongan yang dibuat oleh sebelas sijil tersebut, iaitu berkaitan bayaran interim dan pemegangan jumlah 10%. Oleh itu, adalah tidak betul untuk menganggap sijil 11 sebagai satu sijil terakhir dan muktamad.

(3a) Dalam kes semasa, adalah jelas bahawa tidak wujud peruntukan kontraktual yang memberikan defendan hak untuk membuat penolakan terhadap plaintif berhubung kerja yang dibuat di bawah sijil-sijil 1 hingga 11. Selain itu, hak untuk membuat penolakan tidak diplidkan dalam pembelaan defendan, seperti yang dituntut undang-undang amalan dan prosedur. Jikapun diandaikan (tanpa memutuskan) bahawa di

A atas fakta defendan berhak untuk membuat penolakan (bukan kesnya di sini), itu adalah perkara yang perlu diputuskan melalui ubahsuai-ubahsuai tertentu apabila sijil terakhir dikeluarkan.

B **(4)** Tiada merit pada hujah defendan bahawa tidak wujud hutang yang perlu dibayar segera. Sebaik sijil 11 dikeluarkan oleh defendan kedua yang menentukan jumlah yang perlu dibayar di bawah sijil tersebut, ianya menjadi hutang yang perlu segera dibayar. Selain itu, dalam kes ini, yang mengeluarkan C sijil interim adalah defendan kedua sendiri, dan bukannya arkitek seperti yang biasa berlaku dalam kes-kes seperti ini. Sijil 11, dengan itu, adalah satu pengakuan oleh defendan kedua kepada plaintif kedua bahawa jumlah yang tercatat di dalamnya adalah terhutang dan perlu dibayar. Perbuatan D defendan mencari-cari alasan untuk tidak membayar plaintif kedua bagi kerja yang dibuat olehnya, menunjukkan ketiadaan *bona fides* di pihak defendan.

(5) Yang arif hakim melakukan salah arahan apabila memutuskan E bahawa terdapat isu-isu yang perlu dibicarakan di sini sekaligus memberi hak kepada defendan mendapat izin tak bersyarat bagi membela kes ini.

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 F *CLJ (Rep) 14 SC* ***(foll)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Crown House Engineering Ltd v. Amec Projects Ltd 48 BLR 32 ***(refd)***

Ellis Mechanical Services Ltd v. Wates Construction Ltd [1978] 1 Lloyd's Rep 33 ***(refd)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; G *[1981] CLJ (Rep) 53 FC* ***(refd)***

Lee Teng Siong v. Lee Kheng Lian [2006] 4 CLJ 443 CA ***(refd)***

Ling Heng Toh & Co v. Borneo Development Corp Sdn Bhd [1973] 1 MLJ 23 ***(refd)***

Lubenham Fidelities & Investment Co Ltd v. South Pembrokeshire District H *Council [1985] 33 BLR 39* ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre [1995] 2 CLJ 345 SC ***(refd)***

Penang Port Commission v. Kanawagi Seperumaniam (No 3) [1998] 4 CLJ 8 CA ***(foll)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 CLJ 62; I *[1985] CLJ (Rep) 242 FC* ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 4(1)

For the appellants - Dato VK Lingam (Pradeep Kumar with him); M/s VK Lingam & Co
For the respondents - K Anantham (K Siva Kumar with him); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Suit No: D1-22-822-2002]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This appeal is directed against the order of the High Court granting the defendant (respondent before us) unconditional leave to defend the action. In doing so, the learned judge reversed the order of the senior assistant registrar entering judgment for the plaintiff (appellant before us) for part of its claim. The plaintiff had claimed a sum of RM12,391,117.85. But the registrar only granted judgment for RM5,835,327.31, directing that the balance should go for trial. The plaintiff made no complaint about this latter portion of the registrar's decision. However, the defendant appealed to the judge who, as we said a moment ago, allowed the appeal.

[2] Now, we must say at once that this court does not as a general rule entertain appeals against orders granting unconditional leave to defend. See, *Lee Teng Siong v. Lee Kheng Lian* [2006] MLJU 289. But there may be cases where appellate intervention is called for reasons of justice. Such cases include but are not confined to those which turn "on the construction of a few documents and the court was only concerned with what, in its judgment, was the true construction" (per Raja Azlan Shah CJ (Malaya) in *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 2 MLJ 196); or "where all the issues are clear and the matter of substance can be decided once and for all without going to trial" (per Raja Azlan Shah CJ (Malaya) in *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282; or which concerns the interpretation of a statute. See, *Fadzil bin Mohamed Noor*. The facts here are, in so far as the sum in respect of which the registrar entered summary judgment, clear and uncomplicated. And they are as follows.

[3] The Government of Malaysia awarded the first defendant a contract to build and develop a transit camp at Setapak in Kuala Lumpur. We will, for convenience, refer to that contract as "the building contract". The building contract was worth RM66 million. By a letter dated 15 August 1997, the first defendant sub-contracted the whole of the building contract to a company called TK Yokohama Construction Sdn Bhd for a sum of RM51 million. Then, by the terms of a Novation Agreement dated 20 October 1999, the first plaintiff agreed to perform all the obligations that TK Yokohama Construction Sdn Bhd was to perform under the building contract. In consequence, the latter was released and discharged from performing the building contract. On 1 November 1999, the first plaintiff entered into a joint venture agreement with the second plaintiff. That agreement made it clear that the second plaintiff had been offered loan facilities by Bank of Commerce (M) Bhd to finance the works under the building contract; that the second plaintiff would have the responsibility of arranging funds to complete those works; and that the second plaintiff had lead control over the building contract. By a letter dated 1 July 1999, the second defendant wrote to the Bank of Commerce informing the latter of the following matters. First, that it was the holding company of the first defendant; second, that the it was the main contractor for the works under the building contract; third, that the second plaintiff was the second defendant's main sub-contractor for those works; fourth, it irrevocably authorised the opening of an escrow in the second defendant's name; and fifth, it asked that all proceeds paid into or to be paid into the escrow account were to be credited directly into the second plaintiff's account with the Bank of Commerce. Later, construction work commenced. The second defendant issued progress payment certificates Nos. 2 to 11 to the second plaintiff. All these certificates were issued under its own hand. It paid the second plaintiff a sum of RM13,574,227.71 under progress payment certificates Nos. 2 to 10. Subsequently, the parties mutually terminated the contract. It is common ground that the second defendant did not pay any sum on certificate No. 11. And it is this certificate that forms the subject matter of the plaintiff's claim.

[4] The first ground advanced by the defendants as constituting a triable issue is that there was no privity of contract either between the plaintiffs and the second defendant or between the second plaintiff and the defendants. This ground was however not pleaded in the defendants' defence. Nor was it raised in the

affidavits filed on their behalf. The defendants however raised this issue by way of argument. Their counsel submitted that he was entitled to do this because of the phrase "by affidavit or otherwise" appearing in r. 4(1) of RHC O. 14. With respect we are unable to agree with this submission. In our judgment, on a summons for judgment, a triable issue must be raised by a defendant either by way of an affidavit filed in opposition to the summons or alternatively in a statement of defence. We would here respectfully follow and apply the decision of this court in *Penang Port Commission v. Kanawagi Seperumaniam (No. 3)* [1998] 4 CLJ 8, where Abdul Malek Ahmad, JCA, said:

> In an application for summary judgment, O. 14 r. 4(1) of the Rules of the High Court 1980 ('RHC') applies and it is to the effect that a defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court. That means that cause against the application can be shown by affidavit or in a statement of defence.

[5] To raise triable issues by way of submission on a point not raised in a defence or an affidavit would not, in our judgment, meet the requirements of procedural fairness which is the essence of any litigation. In the present case, we are of the opinion that the learned judge ought not to have taken any notice of the submission on the privity of contract point as it had not been raised in the affidavit or the defence. There is therefore merit in the plaintiff's complaint on this part of the case. In the course of argument, learned counsel for the appellant referred us to a body of material, including the letter of 1 July 1999, which taken in its totality clearly shows that the defendants, at all material times, accepted that there was privity of contract between them and the plaintiffs. However, in view of the view we have already expressed on the privity point we find it unnecessary to dwell any longer on this part of the case.

[6] The second issue which the defendants raised as being triable is that interim certificate 11 was not certified in accordance with the terms of the building contract. There are two facets to this part of the case. In the first place, it was suggested by the defendants that there is a need for the superintending officer and the project director to sign the certificate. On this point, it is to be noted that the building contract in cl. 7.0 (i) provided for payment to be made based on 5% of the Contract Price and for such payments to be certified by the superintending officer and the project director of the Ministry of Defence. However, this

A requirement was varied by TK Yokohama Construction Sdn Bhd in its letter of letter of 21 August 1999 accepting the offer of the building contract. In that letter TK Yokohama Construction Sdn Bhd made it clear that it agreed to the terms of the building contract "except for cl. 7.0 (i) where progress payment claims shall B be made on a monthly interim basis and not based on 5% of the Contract Price". The defendants accepted this variation. The requirement for certification of the work by the superintending officer and the project director accordingly ceased to be applicable and it was on this basis that the building contract was proceeded C with by the plaintiffs and the defendants. This is evidenced by the fact that certificates 1 through 10 were honoured and paid by the defendants although the superintending officer and the project director did not sign any of them. So there is nothing in this point.

D

[7] In the second place, it was submitted that certificate 11 was bad because only one director of the second defendant, namely, Haji Tarin Ayub, signed it whilst Hj Baharin Ayob, the managing director of the second defendant did not. But there is no E requirement anywhere in the building contract as to how many directors of the second defendant should sign a certificate before it will be valid. On the other hand, if you look at certificate 7, you will see that Hj Baharin Ayob signed it but Haji Tarin Ayub did not. Yet, the second defendant honoured certificate 7 by making F payment on it.

[8] To rebut the plaintiffs' argument that certificate 7 had not been approved by Haji Tarin Ayub, the second defendant produced an internal memorandum dated 22 December 2000. The G purpose of adducing that document was to show that Haji Tarin Ayub had approved certificate 7 although he had not actually signed the certificate. Now, certificate 7 for the sum of RM1.5 million was prepared by the defendants on 8 January 2001 and verified on 12 January 2001. However, the internal memorandum approving certificate No 7 was already prepared on 22 December H 2000, that is to say, even before certificate 7 had come into existence. This casts serious doubts on the genuineness of the internal memorandum and consequently on the *bona fides* of the defendants in resisting the plaintiffs' claim.

I

[9] The third point raised before us by learned counsel for the defendants is that certificate 11 is a final certificate and is therefore subject to deductions and a set off in respect of works not properly executed by the plaintiffs. In support of their case that work was improperly done, the defendants relied on a document produced by Sutomo & Associates. In that document M/s Sutomo & Associates set out their valuation of the work done by the plaintiffs which according to them falls short of the plaintiffs' claim. The valuation is dated 9 May 2002 although certificate 11 was issued on 8 May 2001. Sutomo & Associates signed the valuation on 23 August 2002 whilst first defendant signed it on 30 August 2002. The plaintiffs' summons for judgment was taken out on 1 August 2002. In the light of the foregoing chronology, there is much force in the plaintiffs' argument that the suggestion that the work done was defective and improper is an afterthought on the part of the defendants meant to delay the plaintiffs from obtaining final judgment on the sum set out in certificate 11.

[10] Further, in our judgment there is no merit in the argument that certificate 11 is a final certificate. When certificate 11 is compared with certificates 1 through 10, it will be found that it is in the same form as those other certificates. There are only two deductions which all eleven certificates provide for. These are the previous interim payments and the retention sum of 10%. Hence, it cannot be correct to describe certificate 11 as a final certificate. The effect of an interim certificate such as certificate 11 in the present case was described by Edgar Joseph Jr. FCJ in *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre* [1995] 2 CLJ 345 as follows:

> [F]or all practical purposes, it [the interim certificate] conferred 'temporary finality' on the Certificate and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

See also, *Lubenham Fidelities & Investment Co Ltd v. South Pembrokeshire District Council* [1985] 33 BLR 39.

[11] Hearkening to the present instance, it is clear that there is no contractual provision conferring upon the defendants a right of set off against the plaintiffs in respect of the work done under certificates 1 through 11. Further, no right of set off was pleaded in the defendants' defence which is a requirement of the law of practice and procedure. See, *Permodalan Plantations Sdn Bhd v.*

A *Rachuta Sdn Bhd* [1985] 1 CLJ 62; [1985] CLJ (Rep) 242. Even assuming (without deciding) that the defendants do have a right of set off on the facts here (which is not the case), that is a matter that must be resolved by way of adjustments when the final certificate comes to be issued. See, *Ling Heng Toh & Co. v.* B *Borneo Development Corp Sdn. Bhd.* [1973] 1 MLJ 23.

[12] The next issue which was raised by the defendants is that there is here not an immediately payable debt because there is no time specified within which the monies certified by certificate 11 C should be paid. We find no merit whatsoever in this argument. Once certificate 11 was issued by the second defendant specifying the amount that was due under that certificate, it became an immediately payable debt. See, *Crown House Engineering Ltd v. Amec Projects Ltd* 48 BLR 32. Further, in this case, unlike the usual case D where it is an architect who issues an interim certificate, it is the second defendant itself that did so. Certificate 11 is accordingly, in our judgment, an admission by the second defendant to the second plaintiff that the sum stated therein is due and payable. The defendants' attempts to discover all sorts of excuses to avoid E paying the second plaintiff what is due to it for work done strongly supports an inference of the defendants' lack of *bona fides*.

[13] Although the learned judge dealt with only two of the five issues raised by the defendants, as he was well entitled to, we have dealt with all the other issues raised before us by the F defendants. We have found this essential to demonstrate the lack of any *bona fide* triable issues in this case. As at the date of hearing of this appeal, the sum certified in certificate 11 had been outstanding for about five years. This long delay has enabled the defendants to put to their own use, monies that truly belong to G the plaintiffs. This situation is unfortunate.

[14] We remind ourselves that this is a case in which the plaintiff sub-contractor is seeking to recover monies due to him on an interim certificate. The approach to cases of this nature is well H settled and all we need do is to refer to two authorities on the point. First, *Ellis Mechanical Services Ltd v. Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, where Lawton LJ said:

I

> If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible. In my judgment it can be done if the courts take a robust approach, as the Master did in this case, to the jurisdiction under O. 14.

The Federal Court in *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre* said that Lawton LJ's foregoing view "indicates the correct approach which our courts should adopt in ordinary builders' claims under O. 14."

[15] The second authority is *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, where the majority of the court held as follows:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[16] Applying the approach set out in the above two cases which are plainly binding on us, we are of the respectful view that the learned judge misdirected himself when he held that there were triable issues entitling the defendants to unconditional leave to defend in this case. For the reasons already given, the appeal is allowed, the order of the learned judge is set aside and the orders of the registrar are restored. The costs of this appeal and those incurred in the court below shall be borne by the respondents. The deposit in court shall be refunded to the appellants.